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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 562

M. L. JEWELL, AS CHIEF OVERSEER AND SUPREME HEAD OF THE CHURCH OF THE LIVING GOD, THE PILLAR AND GROUND OF TRUTH, *Petitioner,*

vs.

HONORABLE ELMER D. DAVIES, UNITED STATES DISTRICT JUDGE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Bishop M. L. Jewell, by her attorneys, Baker and Baker, Wallace J. Baker, Sr. and Wallace J. Baker, Jr., of counsel, and Clements and Clements, Val Sanford, of counsel, prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Sixth Circuit refusing to grant an original writ of mandamus.

Opinion Below

The opinion of the Court of Appeals has not yet been reported in the Federal Reporter. The opinion of the Court of Appeals appears in full in the Record, pages 12 to 17.

Jurisdiction

The judgment of the Court of Appeals was entered on November 28, 1951. The jurisdiction of this court is invoked under Title 28, U. S. Code, Section 1254 (1).

Questions Presented

The questions presented to this Court are:

1. Whether Mandamus is the proper method of reviewing a stay order granted by the United States District Court, where the reason given by the United States District Court for staying the action is that there is a former suit pending in a state court.

2. Whether the Federal District Court has the right, as distinguished from any inherent power over the control of its docket, to stay an action on the grounds that there is a former suit pending in a state court, and thus abdicate or surrender its jurisdiction.

3. Whether the petitioner's right to proceed with the trial of the federal action depends or is conditioned upon the fact that both the state and federal actions involve different parties and different issues, or whether this right to proceed exists independently of any such differences.

4. Whether the federal courts may determine questions of real property rights which may arise in an action properly before the federal courts, where the same questions, among others, may be involved in an action pending in a state court.

Statutes Involved

Title 28 U. S. C. A. Section 1291;
Title 28 U. S. C. A. Section 1292.

Statement of Matters Involved

On May 4, 1951, the petitioner, M. L. Jewell, as Chief Overseer of the Church of the Living God, the Pillar and

Ground of the Truth, filed an original petition for a writ of mandamus in the United States Circuit Court of Appeals for the Sixth Circuit, being Cause No. 11,395. It was therein requested that the Honorable Court order Judge Elmer D. Davies, District Judge in the District Court of the United States for the Middle District of Tennessee, Nashville Division, to dissolve the stay order previously granted by him in Original Action Number 1196, and to order the said action to be placed on the District Court's docket for trial.

The controversy as set forth in the plaintiff's Original Action No. 1196, concerns several splits in a church, The Church of the Living God, the Pillar and Ground of the Truth.

The Church was founded in 1903 by Mother Tate, and under her leadership, it grew and prospered. Today, the Church is one of the large colored churches in the country. It has congregations in many states of the Union and its Trustees hold millions of dollars worth of property.

During the lifetime of Mother Tate, the Church acquired a tract of land at 1915 Heiman Street, Nashville, Tennessee, and this tract came to be the site of the General Headquarters of the Church. This property was conveyed to "F. E. Lewis, M. L. Tate, B. L. McLeod, and A. H. White, their successors and assigns," as General Trustees of the Church of the Living God, The Pillar and Ground of the Truth. There is nothing of court or public record to indicate that there has been any change in the composition of these Trustees, although other Trustees have been elected and are now so serving.

Until 1949, this property remained unimproved except for two small buildings. However, since that time, Bishop Jewell and her congregations have built a large dormitory, a large assembly room or auditorium and have added to the residence formerly located on the property. They have also

substantially completed a church-sponsored school, known as Jewell Academy, and have spent in excess of One Hundred Thousand Dollars ($100,000.00) for these improvements.

In 1930, Mother Tate departed this life. On May 25, 1931, the customary date for the General Assembly, the General Assembly met in Nashville, Tennessee and, in accordance with the decree book, a committee met to proceed with the selection of a successor. The committee reported that "due to the times and change of conditions, and due to the present condition and spirit of the Church," three (3) capable persons were to be appointed and ordained to fill the office of Chief Overseer. The persons recommended and subsequently elected to fill the office of Chief Overseers in the Church were F. E. Lewis, M. F. L. Keith and Bruce L. McLeod. Bishop Bruce L. McLeod died in 1936 and his wife, M. L. Jewell, the petitioner herein, was appointed Bishop in his place.

Since this meeting of the General Assembly, the various Chief Overseers and their followers have been engaged in litigation in the state courts of Nashville, Tennessee and the courts of various other states.

The first of these many suits was filed by Bishop Keith in 1933, wherein she sought to have herself declared the sole Chief Overseer, to the exclusion of the others. The opinion in this case was not rendered until 1938, but during the five years which intervened, the Church was considered as one Church and the various individual Church congregations which were overseen by the Bishops, acted, in accordance with the court's orders, in relative harmony in conducting the annual General Assemblies and other Church functions.

Shortly before Mother Tate died, A. H. White, one of the original Trustees, split off from the Mother Church and

took with him a number of followers establishing a Church in Philadelphia, Pennsylvania. However, he still claims to be at least a branch of the Mother Church, still holds himself out as a successor to Mother Tate, and he still purports to operate under a Pennsylvania Charter of Incorporation which was taken out by the Mother Church although his Church functions under the church name of The House of God, which is the Church of the Living God, The Pillar and Ground of the Truth.

As a result of the court opinion in 1938, an agreement was signed which was designed to bring peace to the Church. However, this peace was short-lived for, in 1941, Bishop Lewis was expelled from the Church for misconduct at the General Assembly.

Differences then arose between Bishops Keith and Jewell and, after a period of time, Bishop Keith withdrew from the Church, leaving Bishop Jewell the sole Chief Overseer of the Church of the Living God, the Pillar and Ground of the Truth.

Because of the nature of the Church organization, the various Chief Overseers have direct supervision over the Church congregations and when the severances occurred in the Church, the congregations followed or became a part of the dominion of the Bishop of their choice. Most of the congregations remained with the Mother Church. Some of the churches, however, over which Bishops Keith and Lewis had direct control, chose to remain with them and thus withdrew from the Mother Church.

The Chief Overseers have been engaged in litigation in the courts of various states for many years. However, at the present time, only two suits are still pending and they are in Part One of the Chancery Court of Nashville, Tennessee.

On May 22, 1941, the original bill in one of the causes now

pending in Part One of the Chancery Court of Nashville, Tennessee, being Rule Number 57,745, was filed by M. F. L. Keith, Individually, and as One of the Chief Overseers, against Lewis and his daughter. Later that year, Bishop Jewell was allowed to join as a party complainant, and on May 1, 1942, she was so joined.

The case remained relatively dormant until 1950, at which time Bishop Keith filed an amended and supplemental bill against Bishop Jewell and others. A second amended and supplemental bill was filed on July 17, 1950. At the present time, a hearing on the merits of this suit has been postponed by the Honorable Judge Shriver until it is determined whether the United States District Court will go forward with the hearing of the case now filed in that court.

The second suit now pending was filed on June 8, 1948 by the General Trustees, elected by the General Assembly of 1948. This suit was filed in Part Two of the Chancery Court of Nashville against F. E. Lewis, Individually, and being Rule No. 65,959. F. E. Lewis did not answer, and a final decree was entered to the effect that the complainants in that cause were the lawful Trustees of the property and that Lewis was unlawfully occupying the property. On July 11, 1949, F. E. Lewis filed a petition for a writ of error coram nobis to which an answer was filed, and this cause is still at issue, although it has been now transferred to Part One of the Chancery Court.

All of the litigation in the state courts, including the two suits now pending, has been by necessity of a very limited nature. These have been eviction suits, injunction suits, and various other local actions involving either two or three of the Bishops. However, these suits have never determined any of the major questions which have been disrupting the Church for so many years. The very nature of the state courts prohibits any binding decision as to

property or parties outside of the state's jurisdiction and for this reason, litigation has been confined to limited issues in local areas.

In an effort to end this litigation which has taken place over the years in the courts of various states, and to settle all of the issues that exist between all of the parties, in one suit, the petitioner, Bishop M. L. Jewell, filed an original action in the United States District Court for the Middle District of Tennessee. The action was brought by Bishop Jewell, as Chief Overseer and Supreme Head of the Church of the Living God, the Pillar and Ground of the Truth. The defendants are the others claiming to be Chief Overseers, namely, Bishops Keith, Lewis and White, various corporate church entities throughout the country, and the original Trustees as well as the General Trustees elected at the 1948 General Assembly and now recognized as the General Trustees of The Church of the Living God, the Pillar and Ground of the Truth.

In contrast to the limited nature of the two state court suits now pending, the action filed in the Federal Court encompasses all of the parties who claim any interest in the True Mother Church, regardless of the state in which they reside. It also joins all of the issues which must be determined, for the determination of the questions set forth in the federal case will act as an adjudication of interests throughout the United tates. In this court, alone, can the questions be decided as to which Church is the True Mother Church; who is its Chief Overseer; who are the Trustees of the Nashville, Tennessee property, and for whom do they hold title; and what, if any, is the interest of Bishop White, who is a partial holder of record title of the Nashville property but is not a party to either of the two state court suits. Bishop White filed a disclaimer of interest in and to the Church property located in Nashville, Tennessee, but this

disclaimer did not reach any of the remaining issues raised by the complaint; it did not show his authority to file such a paper on behalf of the Church; and it did not meet the requirements for an Answer under Federal Rule 8b.

A motion to stay the Federal Court suit was filed by Bishop Keith and the motion was granted by the Honorable District District Judge Elmer D. Davies. The court order staying the said complaint was granted on the grounds that "there was a former suit pending in Part One of the Chancery Court of Davidson County, Tennessee."

To obtain a review of this order, the petitioner filed a petition for a writ of mandamus in the United States Court of Appeals for the Sixth Circuit on May 4, 1951. The petition prayed that the court order the Honorable Judge Elmer D. Davies to dissolve the stay order previously granted by him in Case Number 1196, and that the cause be placed on the docket of the court for trial.

After an oral hearing before the Court, the writ was denied for the reasons set forth in the court's opinion, page 12 of the record.

Reasons for Granting Writ

I

The decision of the Court of Appeals for the Sixth Circuit has not given proper effect to decisions of the Supreme Court and is in conflict with decisions of other Circuit Courts in holding that Mandamus was not the proper remedy and that the order of the District Court in the Original Action Number 1196 was an appealable order.

The Supreme Court and other Circuit Courts of the Country have consistently held that Mandamus is the proper method of obtaining a review of a stay order granted by the District Court on the ground that there is a

former suit pending in the state court, and that such an order is not appealable.

The problem involved is of great importance for without its determination by the Supreme Court, the litigant will be left to his peril in obtaining a review of a stay order. Uniformity in the interpretation of Sections 1291 and 1292 of the U. S. Code by the Courts of Appeals is a necessity for without such agreement as to their provisions, the litigant's right to review by the Supreme Court will be abrogated.

Direct Conflict With Court of Appeals for Second Circuit

The Circuit Court of Appeals for the Sixth Circuit, by its opinion, is in direct conflict with the Court of Appeals for the Second Circuit. The case of *Mottolese vs. Preston*, 172 Fed. (2d) 308 and 176 Fed. (2d) 301, was decided by the Court of Appeals for the Second Circuit in 1949.

The first opinion of the Court of Appeals for the Second Circuit appears in 172 Fed. (2d) 308 wherein the petitioner appealed from an order of the District Court which stayed any further proceedings in the federal courts, pending the determination of an action in the State Supreme Court of New York.

The Court said of the defendant's right to appeal:

> "An order of a district court staying further proceedings, in an action before it, pending determination of an action in a state supreme court is a 'continuance' and not a procedural substitute for a decree in chancery enjoining prosecution of an action at law.
>
> "An order of a federal district court staying further proceedings in an action before it pending determination of an action in a state supreme court was not a 'final order' from which the plaintiff could appeal."
>
> "It is quite true, as the defendant alleges, that the order is no more than a continuance in the action at

bar, and not a modern procedural substitute for a decree in chancery, enjoining the prosecution of an action at law. Therefore, it is not within the doctrine of *Enelow v. New York Life Insurance Company*, 293 U. S. 379. That it is not a final order needs no argument. For this reason, the appeal must be dismissed under our decision in *Abbe v. New York, New Haven and Hartford Ry. Company*, 2 Cir. 171 Fed. (2d) 387. Nevertheless we do not wish to be understood as holding that the plaintiff is not entitled to relief by way of Mandamus; and as to that, we reserve judgment. Our present decision is no more than that appeal is not the proper remedy."

Upon the appeal being dismissed, the petitioner heeded the advice of the Court and filed an original action in the Circuit Court of Appeals, praying for a Writ of Mandamus. This opinion of the Court appears in *Mottolese* v. *Kaufman*, 176 Fed. (2d) 301, wherein the court held, in part:

"The Court of Appeals has jurisdiction to issue a Writ of Mandamus directing the district judge to proceed in due course with the trial of an action wrongfully stayed."

"There can be no question that we have jurisdiction to proceed by Mandamus, and, if the stay of the action was wrong, the writ should go (McClennan vs. Carland, 217 U. S. 268, 30 S. Ct. 501) for the issues that will be decided in the Consolidated Action will be almost certain to dispose of the case at bar."

The opinion of the Court of Appeals in the instant case is also in direct conflict with the decision of the Supreme Court in the case of *McClellan* v. *Carland*, 217 U. S. 268, 1909. The Court therein held that

"Where a case is within the appellate jurisdiction of the higher court, a Writ of Mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below,

and so held that the Circuit Court of Appeals *may issue mandamus to compel the Circuit Court to vacate a stay pending proceedings* in the state court to determine, and thus render res adjudicata questions within the jurisdiction of the Circuit Court and involved in the action in which the stay was granted.

"In this case, it appears that the original action, commenced in the Circuit Court of the United States, might have been taken on appeal to the Circuit Court of Appeals. The suit involved over $2,000 in amount and was between citizens of different states. * * * But we think it the true rule that where a case is within the appellate jurisdiction of the higher court, a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below.

"Inasmuch as the order of the Circuit Court staying the proceeding until after final judgment in the state court might prevent the adjudication of the questions involved, and thereby prevent a review thereof in the Circuit Court of Appeals which had jurisdiction for that purpose, we think that court had power to issue the writ of mandamus to require the Circuit Court to proceed with and determine the action pending before it." (See *Roche, U. S. Dist. Judge, et al.* v. *Evaporated Milk Assoc., et al.*, 319 U. S. 21).

The Court of Appeals for the Sixth Circuit has held that the stay order is appealable on the grounds that, although it was an interlocutory decision, it nevertheless stayed proceedings in the petitioner's case just as effectively as if the petitioner had been specifically enjoined from proceeding further with the case (R. 12).

This statement of the court, upon which its opinion is premised, is again in direct conflict with the Supreme Court and other Circuit Court decisions.

The U. S. Code, Title 28, Section 1291, provides that:

"*Final* decisions of district courts.

"The courts of appeals shall have jurisdiction of ap-

peals from all *final* decisions of the District Courts of the United States, the District for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Section 1292 of the U. S. Code, Title 28, further provides that:

"The courts of appeals shall have jurisdiction of appeals from

"(a) Interlocutory orders of the district courts of the United States, the District for the Territory of Alaska, the United States District Court for the District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving *injunctions*, or refusing to dissolve or modify *injunctions*, except where a direct review may be had in the Supreme Court."

The Supreme Court has defined "final decision", "injunction" and "court continuance" in many cases arising out of the granting of a stay order. In *Enelow* v. *New York Life Insurance Company*, 293 U. S. 379, 1935, the Supreme Court has distinguished between a *court continuance* and an *injunction, under Section 1292 U. S. Code.*

The Supreme Court said:

"First. A preliminary question arises as to the jurisdiction of the Circuit Court of Appeals. The decree of the District Court was interlocutory, and the question is whether it can be considered to be one granting an injunction and this, within the purview of Section 129 of the Judicial Code (28 U. S. C. 227), permitting appeal.

"This section contemplates interlocutory orders or decrees which constitute an exercise of equitable jurisdiction in granting or refusing an injunction, *as dis-*

tinguished from a mere stay of proceedings which a court of law, as well as a court of equity, may grant in a cause pending before it by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice. (Italics ours.)

"It is thus apparent that when an order or decree is made under 274b, requiring or refusing to require, that an equitable defense shall first be tried, the court, exercising what is essentially an equitable jurisdiction, in effect grants or refuses an injunction, restraining proceedings at law precisely as if the court had acted upon a bill of complaint in a separate suit for the same purpose."

While the *Enelow* case involved the granting of a stay order in an action somewhat different than the petitioner's, it nevertheless clearly establishes the general basis for distinguishing between an injunction and a mere stay order. One of the few instances in which a stay order is considered as an injunction under *Section 1292* of the U. S. Code, is presented in *Enelow* v. *New York Life Insurance Company* —that is, where an equitable defense is heard prior to the complaint.

However, in all of the cases decided by the Supreme Court involving a stay order granted on the grounds that a former or similar suit is pending in a state court, the Court has concluded that such an order is a mere stay granted by virtue of the court's inherent power to control its docket.

Since the complaint in the present action was stayed on the grounds that a former suit was pending in the state courts, the stay order was not an injunction under Section 1292, U. S. Code, and not an appealable order.

II

The decision of the Court of Appeals for the Sixth Circuit conflicts with the decisions of the Supreme Court and other United States Circuit Courts of Appeals in its holding that

the United States District Court had the legal right to grant a stay order on the ground that a former suit was pending in a state court, and thus abdicate or surrender its jurisdiction and refuse to hear the complaint.

The rule, as announced by the Supreme Court, has always been that the pendency of a suit in a state court is no bar to proceedings concerning the same matter in the federal court having jurisdiction. *That is, the District Court may not stay an action, or surrender its jurisdiction and refuse to hear a complaint on the grounds that a former suit is pending in a state court. The petitioner's right to proceed with the trial of the complaint is not discretionary on the part of the court but exists as an absolute right to be heard in the federal courts of our country.*

The determination of this question is important. Should the decision of the Circuit Court prevail, every litigant could be deprived of his constitutional right to have his case heard and determined in the federal courts in the event a suit was pending in the state courts involving parties and issues which might or might not be similar to those of the federal action.

The opinion of the Circuit Court of Appeals goes a long way in destroying the jurisdiction of the federal courts for it authorizes the surrender of jurisdiction by the District Court in all cases which come before that court where two such suits are pending—one in a state court and one in a federal court. The decision completely destroys the right of the litigant to bring and maintain to judgment, a suit in the federal courts on the grounds of diversity of citizenship, and grants to the lower court unlimited control over the cases which it may or may not choose to hear.

This arbitrary staying of an action strikes at the very heart of the federal courts' jurisdiction and the constitutional right of a citizen to sue and to carry to judgment a suit filed in the federal courts.

McClellan v. *Carland,* 217 U. S. 268 has been followed by the Supreme Court, Circuit Courts of Appeals and District Courts since the decision in 1909. It has never been overruled or modified by the Supreme Court and is still cited as the leading case on the point in question. Quoting from the opinion, the Court said:

> "Headnote 2.
>
> "The pendency of a suit in the state court is no bar to proceedings concerning the same matter in a federal court having jurisdiction thereover.
>
> "*Court Opinion.*
>
> "The rule is well recognized that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the federal court having jurisdiction, for both the state and federal courts have certain concurrrent jurisdiction over such controversies, and when they arise between citizens of different states, the federal jurisdiction may be invoked, and the cause tried to judgment notwithshanding a state court may also have taken jurisdiction of the same case."

Kline et al. v. *Burke Construction Co.,* 260 U. S. 226, decided in 1922, held that

> "The construction company, however, had the undoubted right under the statute to invoke the jurisdiction of the federal court and that court was bound to take the case and proceed to judgment. It could not abdicate its authority or duty in favor of the state jurisdiction." (See *McClellan* v. *Carland,* 217 U. S. 268).

There is an almost unbroken line of authority in the Circuit Courts of Appeals, following the Supreme Court.

Great North Woods Club v. *Raymond,* 54 Fed. (2d) 1017, 1931:

"Where insured had commenced suit in state court to cancel policy, and beneficiary had sued in federal court on policy, *it was not within the discretion of the federal court* to stay its action until the state court decision.

"Court opinion:

"Where two courts are merely different divisions of the same sovereignty and though the earlier suit is not a ban to the latter, it may well be within the limits of discretion to delay the second suit until the first is disposed of *but,* where the federal court has jurisdiction of parties and of subject matter, it is usually true that the plaintiff in that court has an absolute right to have his case in that jurisdiction proceed to trial, and that there is no discretion to stay that action, pending the result of an earlier one in the state court. *McClellan* v. *Carland,* 217 U. S. 268, 30 S. Ct. 501. True, in that case, the suit in the state court was not between the same parties and would not have been an adjudication in the federal court, but in *Defiance Company* v. *Defiance,* 100 F. 178, Judge Severans, in the Circuit Court, refused to delay, under circumstances generally similar to these here involved, and in *City of Ironton* v. *Harrison Co.,* 212 F. 353, this court evidently thought plaintiff has an absolute right to proceed in the federal court in spite of an earlier suit pending in the state court."

See also *Princess Lida* v. *Thompson,* 305 U. S. 456; *Watson* v. *Jones,* 80 U. S. 679; *Roche* v. *Evaporated Milk Association,* 319 U. S. 21; *Meredith* v. *City of Winter Haven,* 320 U. S. 228; *City of Ironton* v. *Harrison Construction Company,* 212 Fed. (2d) 353; In re President and Fellows of Harvard College, 149 Fed. (2d) 69; *Maryland Casualty Company* v. *Glassell, Taylor and Robinson, et al.,* 156 Fed. (2d) 519; *Armour & Company* v. *Miller,* 91 Fed. (2d) 521; and *Bryant* v. *Atlantic Coast Line Railway Company,* 92 Fed. (2d) 596.

The problems involved in the granting of a stay order

and the distinguishing between the court's *power, right* and *discretion* to grant such stays has been before the Supreme Court in many leading cases. The opinion of the Court of Appeals for the Sixth Circuit recites a correct general statement of the inherent power of a court to control its docket but completely fails to distinguish this general power from the right of the court to stay the petitioner's action in this particular case.

This is in direct conflict with the Supreme Court and the other Circuit Courts of Appeals. In *McClennan* v. *Carland, supra,* the Supreme Court said of this difference:

> "It cannot be denied that a circuit court of the United States, like other courts, had power to postpone the trial of cases for good reasons, but by orders made in this case, the federal court withheld the further exercise of its authority until the state court, by its action in a case involving all the parties, might render a judgment which would be res adjudicata, and thus prevent further proceedings in the federal court."
>
> "The rule is well recognized that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the federal courts having jurisdiction."

The case cited by the Court of Appeals in support of its opinion is actually in conflict with its own decision on this point. The case of *Landis* v. *North American Co.,* 299 U. S. 248 very clearly distinguishes between the District Court's inherent power to control its docket and the right of the court to abdicate or surrender its jurisdiction in any particular case.

It is only in very exceptional cases or circumstances that the Federal District Court may stay proceedings where the plaintiff has the right to maintain the action. The Supreme Court has recognized that "extraordinary public interest" is one of the exceptional reasons for which a court may exercise its power to stay an action. This power may also

be exercised by the court, in its discretion, in cases involving state constitutions, state administrative procedures, interference with the internal affairs of a corporation, or where the federal action seeks a declaratory judgment and exactly the same issues are pending in a state court. See *Pennsylvania* v. *Williams, et al., Receivers,* 294 U. S. 176; and *General Exporting Company* v. *Star Transfer Line, et al.,* 136 Fed. (2d) 329.

However, the petitioner's action was stayed expressly on the grounds that a former suit was pending in the state courts and the Supreme Court has consistently held that, under such circumstances, the District Court may not stay the petitioner's action.

III

The doctrine established by the Supreme Court in Question II was evolved mainly from situations in which the parties and causes of action were the same or similar in both the state and federal courts. The rule and its application is so much the stronger in the present case, however, for here both the state and federal actions involve different parties and different causes of action. See *Purcell, et al.* v. *Summers, et al.,* 126 Fed. (2d) 390, 1942, wherein the court said:

> *"There is no ground for dismissing an action in personam in federal court where there is another action pending between same parties respecting same subject matter, and a fortiori, there is no ground for dismissal where parties are different and subject matter is different."*

The right of the petitioner to proceed with the trial of the action is general, and is to be applied whether the suit is on in personam or in rem. The Federal Courts have, on some occasions, applied the doctrine of *comity* when the suit in

the state court is an in rem proceeding, and the state court has taken possession of the property. However, even this doctrine is not applicable unless the two suits are identical, that is, involve the same parties and the same causes of action.

The doctrine of comity has no bearing in the present case for two reasons:

First. The parties and causes of action, as shown previously, are entirely different.

Cook v. Burnley, 78 U. S. 659:

> "A suit pending in a state court between parties not the same as in a suit here cannot be pleaded in abatement in the federal courts, nor can a suit pending be pleaded in abatement after a plea on the merits."

Pacific Line Stock Company v. Lewis, et al., 241 U. S. 440, 1916:

> "The rule of retention of a cause by the first of two courts of concurrent jurisdiction to the exclusion of the other court and the protection of its jurisdiction by injunction, applies *only* where there is substantial identity in the rights asserted and purposes sought in the several suits."

Watson v. Jones, 80 U. S. 679, 1871:

> "But when the pendency of such a suit is set up to defeat another, the *case* must be the same. There must be the same parties, or at least such as represent the same interest, there must be the same rights asserted, and the same relief prayed for."

Second. Neither the state nor the federal courts have taken such possession of the Nashville property as would cause the doctrine to be invoked, nor does the petitioner's action necessitate the courts taking possession or control of the property.

The similarity of parties and issues is therefore only in question in an action in rem where the first court to acquire jurisdiction has seized the res involved. The opinion of the Court of Appeals for the Sixth Circuit holds that the District Court may stay any type of action on the ground that there is a former suit pending, regardless of the existence of differences in the parties and issues in the state and federal courts, and is, therefore, in conflict with the Supreme Court and the other Circuit Courts of Appeals.

IV

The decision of the Court of Appeals for the Sixth Circuit has not given proper effect to decisions of the Supreme Court and is in conflict with decisions of the other Circuit Courts if it has held that the federal courts may not determine questions of real property rights in an action properly before the federal courts where the same question, among others, may be involved in an action pending in a state court.

From the opinion of the Honorable Judge Hicks, it is difficult to determine the exact meaning of that part of the opinion dealing with property rights (Page 15 of the Court Opinion). It is our interpretation, however, that the Court meant to say that the federal courts will not decide questions relating to real property rights when the same questions may be pending in the state court.

The Court of Appeals, in its opinion, said that federal courts adopt and apply the decisions of state courts affecting questions of title to real estate. This principal is elementary and is not questioned. The Supreme Court has consistently held that the federal courts will adopt and apply the law of the situs of the real property in determining rights affecting the property, and all of the decisions cited by the Court of Appeals support the doctrine. However,

the question of whether state or federal law shall be used by the court in determining property rights has never been raised by the parties and has certainly not been an issue in the Mandamus proceedings.

If the opinion is to have any meaning, therefore, the court must be raising the issue of the federal courts' ability to entertain the question of property rights. If this is the correct interpretation, then the court opinion is in conflict with the long line of authority established by the Supreme Court. See *Beauregard* v. *City of New Orleans*, 59 U. S. 497; *Arndt* v. *Griggs*, 134 U. S. 316; and *Pennoyer* v. *Neff*, 95 U. S. 714.

Conclusion

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 562.

M. L. JEWELL, as Chief Overseer and Supreme Head of the Church of the Living God, the Pillar and Ground of the Truth,
Petitioner,

vs.

HON. ELMER D. DAVIES, United States District Judge,
Respondent.

BRIEF

Of Respondent in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 562.

M. L. JEWELL, as Chief Overseer and Supreme Head of the Church of the Living God, the Pillar and Ground of the Truth,
Petitioner,

vs.

HON. ELMER D. DAVIES, United States District Judge,
Respondent.

BRIEF

Of Respondent in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE.

The petition for certiorari states that there are four questions presented to this Court:

1. Whether mandamus is the proper method of reviewing a stay order granted by the United States District Court, where the reason given by the United States District Court for staying the action is that there is a former suit pending in a state court.

2. Whether the Federal District Court has the right, as distinguished from any inherent power over the control of its docket, to stay an action on the grounds that there is a former suit pending in a state court, and thus abdicate or surrender its jurisdiction.

3. Whether the petitioner's right to proceed with the trial of the federal action depends or is conditioned upon the fact that both the state and federal actions involve different parties and different issues, or whether this right to proceed exists independently of any such differences.

4. Whether the federal courts may determine questions of real property rights which may arise in an action properly before the federal courts, where the same questions, among others, may be involved in an action pending in a state court.

That these questions are not, however, presented by the record in this cause will be seen from the opinion of the Court of Appeals (R. 12-17).

The petition for writ of mandamus in substance stated that there were three factions of the Church of the Living God, the Pillar and Ground of the Truth, claiming title to certain real estate located in Nashville, Tennessee, and that petitioner, as the head of one faction, claimed the entire title, and filed suit in the United States District Court for the Middle District of Tennessee, praying that title to said property be decreed to be held for her, or her faction alone, and to declare that the other factions had no right, title or interest in said property. The petition further alleged that a motion to stay said suit was filed by M. F. L. Keith, the head of another faction, and that the motion was granted for the reason that a former suit was pending in the Chancery Court of Davidson County, Tennessee. In the petition for mandamus the petitioner did not allege that the United States District Judge had abused his discretion in grantnig the stay order, but alleged "that the Hon-

orable Court was without discretion to stay the proceedings in this Court" (R. 2-9, at p. 6).

A show cause order was issued to the United States District Judge, and upon motion M. F. L. Keith, the real party in interest, was allowed to file a brief, and to present oral argument, as amicus curiae (R. 10). The Court of Appeals held that "while other issues are involved in the District Court case, there is one important and probably the most important issue, the crux of which is common to both courts, and that is, who has the legal title to the church property." The Court then pointed out that in determining the question of title to real estate, the federal courts adopt and apply the decisions of state courts. Thus the District Court had jurisdiction over petitioner's case, and it therefore had power to make the stay order. The Court then very properly held that the question of the stay order was a matter within the discretion of the District Court, and it not appearing that there had been an abuse of such discretion the writ of mandamus would not issue.

After making the above holding on the substantive part of the suit, the Court of Appeals, by way of dictum, pointed out that the order of the District Court was an appealable order, because, although it was interlocutory and did not in express words grant an injunction, it stayed proceedings in petitioner's case as effectively as if petitioner had been specifically enjoined. Having thus the substantial effect of an injunction, the order was appealable (Section 1292, Title 28, U. S. Code), and, therefore, mandamus was not the proper remedy (R. 12-17). The questions presented in the petition for certiorari do not mention the real issues in the case here presented—whether or not the United States District Judge abused his discretion—but proceed on the theory advanced in the petition for mandamus, that it is a matter over which the District Court had no discretion.

ARGUMENT.

SUMMARY OF THE ARGUMENT.

POINT A: Whether mandamus or appeal is the proper method of reviewing same, an order of the United States District Court staying an action because a former suit is pending, is a discretionary order, and will not be dissolved in the absence of a showing that there was an abuse of such discretion.

POINT B: An order of the United States District Court staying an action for the reason that a former suit is pending in a state court, is discretionary.

POINT A.

Whether mandamus or appeal is the proper method of reviewing same, an order of the United States District Court staying an action because a former suit is pending, is a discretionary order, and will not be dissolved in the absence of a showing that there was an abuse of such discretion.

Petitioner by-passes the real issue, and ignores the holding by the Court of Appeals that there was no showing of any abuse of discretion, and challenges the statement in the opinion that the order of the District Court is appealable. Relying on what appears to be a conflict in procedure between the Second Circuit, and this portion of the opinion in the present case, petitioner seeks this opportunity to have the substantive portion of her petition re-examined. It is submitted that this Court will not grant the writ of certiorari in order to discuss what might be a conflict of opinion on a question of procedure when it is apparent that there is no merit in the substantive portion of the

case. This is particularly true when the question in the suit concerns title to real property, a question that is to be determined by the decisions of the state court. Beauregard v. City of New Orleans, 59 U. S. 497, 15 L. Ed. 469; Ruhlian v. New York L. Ins. Co., 304 U. S. 202, 58 S. Ct. 860, 82 L. Ed. 1290; Palmer v. Hoffman, 318 U. S. 109, 87 L. Ed. 645.

Petitioner states that the decree of the Court of Appeals is in conflict with the decisions of other Circuits and in conflict with the decision of this Court. As authority for this statement petitioner cites the cases of Mottolese v. Preston (C. C. A. 2), 172 Fed. (2d) 308; Mottolese v. Kaufman (C. C. A. 2), 176 Fed. (2d) 301; McClellan v. Carland, 217 U. S. 268, 54 L. Ed. 762. While it is submitted that the question of whether or not a stay order in any particular case is appealable depends on the facts in each particular case, it is true that in the case of Mottolese v. Preston, supra, an order staying the suit—with leave to the plaintiff to move to vacate it—was held not to be appealable, and thereafter in the case of Mottolese v. Kaufman, supra, a petition for mandamus was filed which the Court held to be proper in that case. Counsel for respondent do not understand that these cases established, or attempted to establish, any general rule. If the Mottolese cases and the present case are construed as adopting conflicting rules, it is submitted that the rule in the present case should be followed, for certainly an order should be determined by its substantial effect. In any event, however, the writ of certiorari should not be granted in this case where there is no error, and where no error is claimed, in the holding of the Court on the real issues involved.

The case of McClellan v. Carland, supra, cited as authority for the proposition that the holding in the present case is in conflict with the decisions of this Court, does not substantiate such proposition. That case held that a

Circuit Court of Appeals may issue mandamus to compel a District Court to vacate a stay order in a particular case. With this rule all are in agreement. But the McClellan case has no further similarity to the case at bar. In that case a petition for mandamus was presented to the Circuit Court of Appeals, who denied the prayer and dismissed the petition. A petition for writ of certiorari was filed, and granted, and the Supreme Court held that upon the record as presented the Circuit Court of Appeals should not have denied the petition, but should have issued an alternative writ, or an order to show cause, in order that the District Judge might have been heard before the question was determined as to whether mandamus should issue or not. This is exactly the procedure that was followed in the present case, and upon the order to show cause issuing, the real party in interest, with the consent of the District Judge, who of course is only a nominal party, was allowed to file a brief and present oral argument, as amicus curiae.

Hence, Question 1 presents at most a procedural question, and whether the proper procedure is by appeal or by mandamus, in the absence of a showing of an abuse of discretion by the District Judge, the petition should be denied. Certiorari is a discretionary writ and as to questions controlled by state law, conflict among circuits is not of itself a reason for granting the writ, Ruhlian v. New York L. Ins. Co., supra, and the writ is not granted except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals. Layne & Bowler Corp. v. Western Well Works, 261 U. S. 387, 43 S. Ct. 422, 67 L. Ed. 712.

POINT B.

An order of the United States District Court staying an action for the reason that a former suit is pending in a state court, is discretionary.

Questions 2, 3 and 4 in the petition for certiorari present only one issue. Is the granting of a stay order by the United States District Judge a discretionary matter?

Counsel for respondent cannot improve upon the opinion of Judge Hicks in regard to this issue. After pointing out that the one important issue in the suit that was stayed was who had legal title to certain real estate situated in Tennessee, and that this question would have to be determined by Tennessee law, the Court said:

"The district court, of course, had jurisdiction over petitioner's case and it therefore had the power to make the stay order. This is true because the power to make the order is incidental to the power of the court to control the disposition of the case on its docket. This power is not affected by the fact that the parties in the two causes are not exactly the same or that the issues in each were not identical. Landis v. North Amer. Co., 299 U. S. 248, 254; North Amer. Co. v. Landis, 85 Fed. (2d) 398, 402 (CA-DC). Mandamus does not lie to control the discretion of the Court in making the order unless it appears that its discretion (fol. 17) has been abused, and we find no such abuse of it here. Virginia v. Rives, 100 U. S. 314. Moreover, we are not authorized to grant mandamus here because we are specifically requested to command the District Judge to dissolve the stay order granted by him. This we cannot do. The extraordinary writ of mandamus will not issue to require a court to make a particular decision. Ex Parte Park, etc., v. Tilford, 245 U. S. 83, 85. It will not lie to compel a court to reverse or retract a decision such as is sought here. I. C. C. v. Waste Merch. Assn., 260

U. S. 32, 34; Ex Parte Slater, 246 U. S. 128, 134; Ex Parte Roe, 234 U. S. 70, 73; Ex Parte Wagner, 249 U. S. 465, 471; In re Rice, 155 U. S. 396, 403; Wilbur v. United States, 281 U. S. 206, 218. Furthermore, the general rule is that the writ of mandamus will issue only where the duty to be performed is ministerial and the obligation to act peremptory, and plainly defined. Roche v. Evap. Milk Assn., 319 U. S. 21, 26; Internat. Contr. Co. v. Lamont, 155 U. S. 303. We have been cited to no statute or decision which makes it the plain duty of the judge to retract the order herein complained of. Wilbur v. United States, supra (281 U. S. 218). He might have revoked the order or modified it in his discretion but there is a wide field between such course and compulsion."

Of course, there are many other cases that restate the rule as announced (e. g., Armour & Co. v. Miller [C. C. A. 8], 91 Fed. [2d] 521), and review the reasons underlying same, but it is not thought necessary to burden the Court by attempting to analyze these cases here.

On page 20 of the petition for certiorari petitioner states: "The opinion of the Court of Appeals for the Sixth Circuit holds that the District Court may stay any type of action on the ground that there is a former suit pending, regardless of the existence of differences in the parties and issues in the state and federal courts, and is, therefore, in conflict with the Supreme Court and the other Circuit Courts of Appeals." This is an erroneous conclusion of the petitioner. The Court of Appeals prefaced its opinion by stating that the issue concerned title to real property and that this question would be decided by applying the decisions of the state court, and recognizing the comity between the courts, the rule was merely applied that issuing the stay order was a discretionary matter. This is far different from the summation given to the opinion by the petitioner.

Petitioner's bold statement on page 14 of the petition for certiorari that a United States District Court has no discretionary power to stay a suit because of a former suit pending in a state court will not bear careful criticism. Cases referred to for this rule are actions in personam and that rule is not here involved or questioned (e. g., Great North Woods Club v. Raymond, 54 Fed. [2d] 1017). Petitioner herself recognizes that the above rule is limited, for on page 17 of the petition she states that in exceptional cases a federal district court may stay such proceedings. Finally, though reluctantly, petitioner admits that where the proceeding is in rem, and the state court has taken possession of the property, the federal court has the discretionary right to issue a stay order (Petition for Certiorari, p. 19).

Petitioner did not discuss the next logical step, and while the Court of Appeals did not refer to it, there is another rule supported by a line of cases that sustain the decree of the District Court staying the suit. As pointed out by Judge Hicks the real issue in the suit stayed, and in the former suit pending in the Chancery Court of Davidson County, Tennessee, concerns title to a parcel of real estate situated in the State of Tennessee. Although in the petition for certiorari it is insisted that the issues and the parties are different, the only additional party in the federal suit is A. H. White of Philadelphia, Pennsylvania, who filed a disclaimer of interest, and while the issues appear to us to be exactly the same, it cannot be denied that they are substantially the same. Hence, since the real subject matter of the entire case is real property, and the state court has first acquired jurisdiction over the res, the rule announced in Kline v. Burke Const. Co., 260 U. S. 226, 43 S. Ct. 79, 67 L. Ed. 226, 24 A. L. R. 1077, "that where the jurisdiction of the state court has first attached, the Federal Court is precluded from exercising its jurisdiction over the same res to defeat or impair the

state court's jurisdiction'' is applicable. See Covell v. Heyman, 111 U. S. 176, 4 S. Ct. 335, 28 L. Ed. 390; Farmers' Loan & T. Co. v. Lake Street Elevated R. Co., 177 U. S. 51, 20 S. Ct. 564, 44 L. Ed. 667; Toucey v. New York L. Ins. Co., 314 U. S. 118, 62 S. Ct. 139, 86 L. Ed. 100; Princess Lida v. Thompson, 305 U. S. 456, 59 S. Ct. 275, 83 L. Ed. 285; Purcell v. Summers, 126 Fed. (2d) 390, 395; Heidritter v. Elizabeth Oil Cloth Co., 112 U. S. 294, 5 S. Ct. 135, 28 L. Ed. 729.

CONCLUSION.

It is therefore respectfully submitted that there is no showing of any abuse of the discretionary power of the United States District Court and that therefore the petition for certiorari is without merit and should be denied.

Respectfully submitted,

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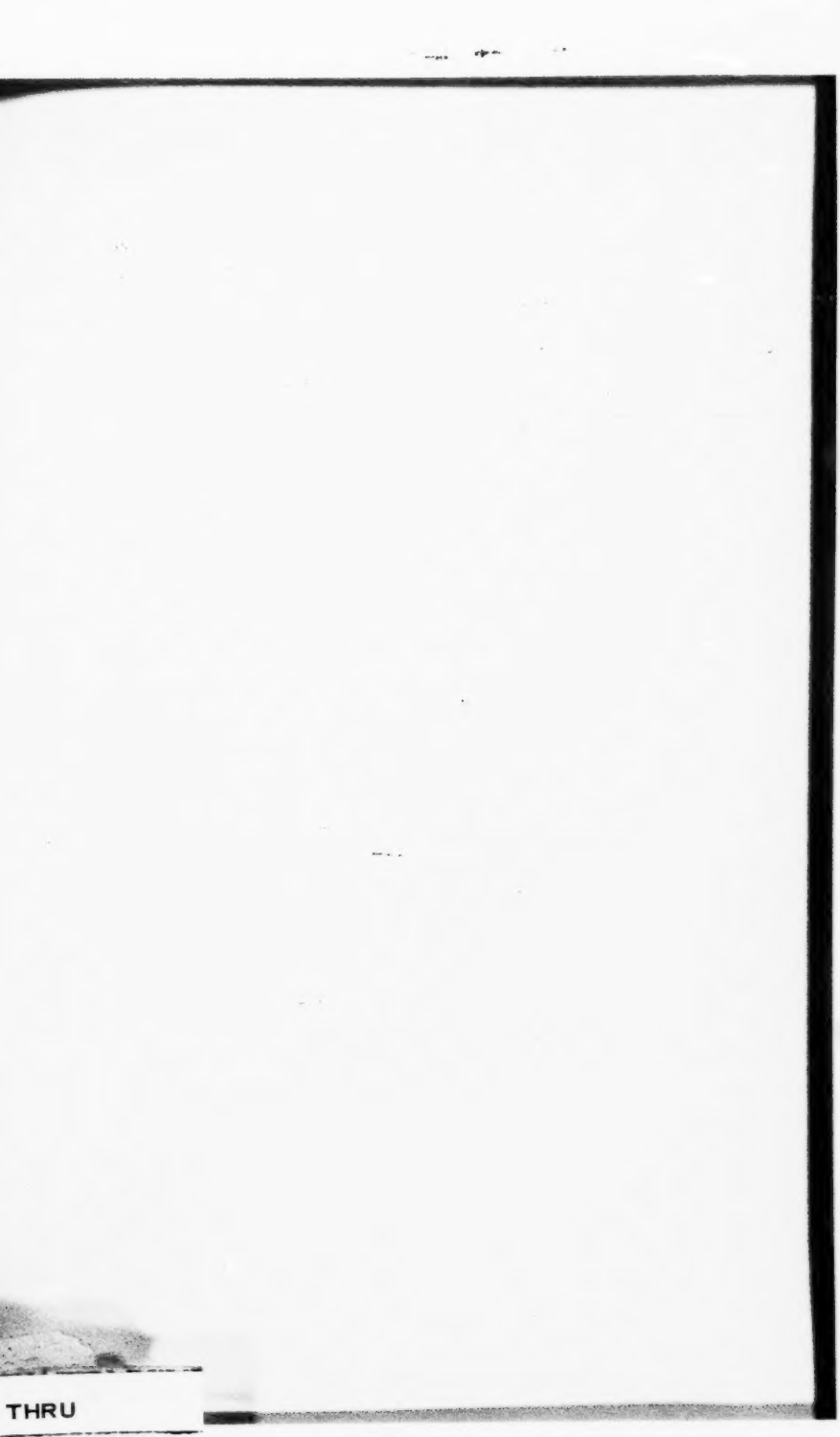
DARK PAGE BLEE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